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In The

Supreme Court of the United States

October Term, 1978

IOWA BEEF PROCESSORS, INC., EDWARD W. ROTHE, and LEE A. FREEMAN, SR.,

Petitioners,

vs.

LEX HAWKINS and JOHN A. COCHRANE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The opinions of the United States Court of Appeals for the Eighth Circuit and of the United States District Court for the Southern District of Iowa are correctly set forth in Appendix A to the Petition for Writ of Certiorari and are as yet unreported.

JURISDICTION

Respondents do not question the jurisdiction of this Court.

STATUTES AND RULES INVOLVED

28 U.S.C. § 1332(a) (1):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between — (1) citizens of different States...

28 U.S.C. § 1391(a):

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

Rule 8(a) (1), F.R. Civ. Proc.:

> *Claims For Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the

court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it...

Rule 12(h) (3), F.R. Civ. Proc.:

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 13(a), F.R. Civ. Proc.:

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Rule 15(c), F.R. Civ. Proc.:

Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a

mistake concerning the identity of the proper party, the action would have been brought against him.

QUESTIONS PRESENTED

1. Should this Court grant certiorari to petitioners, who claim duplication of judicial resources and possible conflicting decisions, when those petitioners precipitated the problem by filing two identical actions in separate, distant districts in order to obtain discovery denied to them by a federal judge supervising discovery in an antitrust action in yet another district?

2. Should this Court grant certiorari to determine whether the Iowa common law actions of abuse of process and tortious interference with prospective advantage (resulting from the service of two identical lawsuits commanding appearances in two separate, distant districts and from two identical motions for production of documents demanding delivery to two separate distant places of the entire attorney work product in yet a third separate antitrust action) arise out of the same transaction or occurrence as claims for breach of contract and breach of fiduciary duties by former employees?

3. Should this Court grant certiorari to determine whether defendants to two identical complaints (with defects in subject matter jurisdiction apparent on their faces, filed in two separate, distant districts) must wait for the plaintiff to possibly cure the subject matter defects, either by permissive amendment or by refiling, and further must wait for the plaintiff to possibly dismiss one of the actions, in order to determine whether a separate cause of action might be a permissive or compulsory counterclaim to either one or both of the two identical actions?

4. Should this Court grant certiorari to determine where claims of abuse of process and tortious interference with prospective advantage arose under the Iowa common law and the federal diversity of citizenship venue provisions?

STATEMENT OF THE CASE

Respondents are lawyers representing the plaintiffs in an antitrust action filed in the Southern District of Iowa on August 10, 1976. The plaintiffs to that action are cattlemen who seek damages and injunctive relief against four major beef packers for violation of Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1 & 2. *Meat Price Investigators Association ("MPIA"), et al. v. Iowa Beef Processors, Inc., et al.*, Civil No. 76-252-2 (S.D. Iowa), now CA 3-77-0780-C (N.D. Tex.). Petitioner, Iowa Beef Processors, Inc. ("IBP"), is named a defendant to the *MPIA* suit and is represented in the *MPIA* suit by petitioners, attorneys Edward W. Rothe and Lee A. Freeman, Sr. The antitrust case was transferred by order of June 7, 1977, of the Judicial Panel on Multidistrict Litigation to the Northern District of Texas for consolidated pretrial proceedings with other *Beef Industry Antitrust* cases already commenced against retail food chain stores. *In Re Beef Industry Antitrust Litigation*, MDL No. 248, 432 F. Supp. 211 (J.P.M.L., 1977).

From the beginning, the *MPIA* antitrust suit in the Southern District of Iowa was actively supervised and controlled by the trial judge, Hon. William C. Hanson, pursuant to the trial court's powers to supervise complex litigation. During the course of their investigations and discovery in the antitrust case against IBP, lawyers Hawkins and Cochrane were placed in contact with one Hughes A. Bagley, a former employee of IBP, then employed by another defendant to the antitrust case, Spencer Foods, Inc. The conversations related to Bagley's knowledge of actions of IBP. The essence of Hawkins' and Cochrane's transactions with Bagley are stated in an opinion of Chief Judge Hanson of the Southern District of Iowa. *Meat Price Investigators Association, et al. v. Iowa Beef Processors, Inc., et al.*, 448 F. Supp. 1 (S.D. Iowa 1977). The June 24, 1977, ruling of Chief Judge Hanson denied a motion of Spencer Foods to sever the

antitrust action and to disqualify Hawkins and Cochrane from prosecuting the antitrust action against Spencer. The United States Court of Appeals for the Eighth Circuit affirmed. *Meat Price Investigators Association, et al. v. Spencer Foods, Inc., et al.*, 572 F. 2d 163 (CA8 1978).

During the hearings held on the Spencer Foods motion, counsel for IBP was allowed limited participation. Counsel for IBP, the petitioners Rothe and Freeman here, filed motions and made a record seeking discovery of the entire transaction, including certain documents, between Hawkins, Cochrane and Bagley. For the most part, Chief Judge Hanson denied the motions and limited IBP's participation on grounds that such participation was not pertinent to Spencer Foods' underlying motion and was an attempt by IBP to obtain discovery out of order in a complex proceeding. (Tr. of Hearing of Apr. 29, 1977, (Civ. No. 76-252-2) (S.D. Ia) 82-83; Tr. of Hearing of May 10, 1977, (Civ. No. 76-252-2) (S.D. Ia.) 85-87, 121-125, 132-133, 154-167).[1]

At the commencement of the *MPIA* antitrust litigation, IBP had moved to depose all MPIA board members on the merits of the action and had made an omnibus request for production of documents from MPIA and its attorneys. By Order of December 10, 1976, Chief Judge Hanson limited the discovery to the special issues of standing of MPIA and fraudulent concealment, and denied the omnibus discovery IBP sought until the preliminary issues were determined.

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[1] P.A. refers to the petitioner's appendix to the petition for writ of certiorari.

CA8 A. refers to the appendix filed with the Court of Appeals for the Eighth Circuit in Nos. 77-1988 and 78-108 (consolidated), which are here sought review. This appendix contains the full proceedings before the Trial Court.

Tr. of Hearings on Apr. 29, 1977, and May 10, 1977, refers to proceedings before Hon. William C. Hanson in *Meat Price Investigators Association, et. al. v. Iowa Beef Processors, Inc., et. al* (Civ. No. 76-252-2) (S.D. Iowa) which were incorporated by reference in the case below, and included in the appendix to *Meat Price Investigators Association, et al. v. Spencer Foods, Inc., et al.*, 572 F.2d 163 (CA8 1978).

Being dissatisfied with the course of discovery in the *MPIA* suit and endeavoring to "scare" former IBP employees from talking to MPIA and its attorneys, the petitioner IBP, through its attorneys, and filed two identical actions against respondents Hawkins and Cochrane (and others) in the Southern Distirct of New York and the Northern District of Iowa, claiming a conspiracy to induce former IBP employees to breach their contractual obligations and unspecified "fiduciary duties". The identical actions claim that on or about October 10, 1975, IBP and Bagley had executed a "Settlement Agreement and Release" which stated the terms and conditions of Bagley's termination with IBP. (CA8 A. 4-5, 8-9, 20-22, 25-26). Among the terms contained in the Agreement was a covenant where Bagley purported to agree with IBP "to forever refrain from aiding, abetting or in any way assisting any third party not a party to this agreement in the bringing of any action or the prosecution of any claim or demand of whatever kind or nature against IBP for any matter, fact, circumstance, happening or thing whatsoever occurring or failing to occur from the beginning of the world to the day of the date of these presence." (CA8 A. 54-58).

Hawkins was served with the identical actions by the U.S. Marshal at his home in Des Moines, Iowa. Cochrane was served with the identical actions by the U.S. Marshal in his home in St. Paul, Minnesota. Shortly thereafter, both Hawkins and Cochrane were served by U.S. Mail at their homes with duplicate requests for documents made by IBP in conjunction with the identical actions in the Northern District of Iowa and the Southern District of New York. Although the alleged communications with Bagley occurred January of 1977, the request for documents instructed Hawkins and Cochrane to produce their entire files, including attorney work product, relating to IBP from January 1, 1975 to date. In essence, the request was for the attorneys' work product in the *MPIA* antitrust case. The requests instructed Hawkins and Cochrane to produce the same documents in offices of IBP's counsel in Sioux City,

Iowa and in New York City. These requests sought the same discovery which had just been denied IBP in the antitrust case by Chief Judge Hanson. (CA8 A. 6-8, 20-22).

The identical actions by IBP were allegedly based on diversity of citizenship. In fact, the citizenship in neither of the actions was diverse, inasmuch as the Amalgamated Meat Cutters Union, because of *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965), is deemed to be a citizen of every state in which it has members. At the time, the Meat Cutters Union had members in Nebraska and Delaware, the principal place of business and state of incorporation of IBP. Accordingly, the actions failed *ab initio* for lack of jurisdiction of the subject matter. On grounds of lack of diversity of citizenship, Hawkins, Cochrane and other defendants to the duplicate actions filed motions to dismiss in both cases. (CA8 A. 21-22, 61-62) Then, on July 22, 1977, Hawkins and Cochrane brought this instant complaint against IBP, Rothe and Freeman in the Southern District of Iowa, where the controversy originally arose. (CA8 A. 3-11)

This action pleads that petitioners abused otherwise lawful process of the federal courts and tortiously interferred with respondents' prospective business advantages by petitioners' transparent defensive moves purposely designed to thwart orderly discovery and processing of the MPIA antitrust litigation previously filed in the Southern District of Iowa. (CA8 A. 3-11) The essence of the claims is that the service of two identical lawsuits, admittedly for the purpose of muscling some defendants into relinquishing their venue and personal jurisdiction rights in order to avoid defending two lawsuits, and the service of two identical motions to produce, calling for the work product in the antitrust cases denied by the court supervising the antitrust case, is an abuse of process and tortious interference with prospective advantage. (CA8 A. 6-9).

On August 1, 1977, IBP acknowledged the subject matter

defects in the Sioux City and New York cases by filing amended complaints naming the three highest officers of the Amalgamated Meat Cutters, of Illinois citizenship, as class representatives of the Union's members pursuant to Rule 23.2, and deleting the Union as a party. (CA8 A. 45-60) On August 2, 1977, Hawkins and Cochrane moved to consolidate the three actions for pretrial purposes pursuant to 28 USC § 1407. (CA8 A. p. 19-24). At the oral hearing before the Judicial Panel on Multidistrict Litigation, counsel for IBP announced that IBP would voluntarily dismiss the action in the Southern District of New York, which subsequently occurred. Accordingly, the Judicial Panel denied consolidation and transfer because there were only two actions pending. *In Re Iowa Beef Processors Employment Termination Contract Litigation*, MDL No. 315 (J.P.M.L., October 5, 1977) (P.A. B-11).

Respondents' factual proof under the complaint, when viewed in the light most favorable to respondents, would show:

The respondent Hawkins resides in Des Moines, Iowa and maintains law offices in Des Moines, Iowa. (CA8 A. 4). Respondent Cochrane resides in St. Paul, Minnesota, maintains law offices in St. Paul, and has been authorized by Chief Judge Hanson to litigate in the Southern District of Iowa. (CA8 A. 4) The headquarters of the Meat Price Investigators Association, the plaintiff in the antitrust action, is in Des Moines, Iowa. The principal meeting between Hawkins, Cochrane and Bagley, where the documents of IBP were received occurred in Des Moines, Iowa, on January 11, 1977. This meeting at Des Moines was the first time Hawkins, Cochrane and Bagley had met, and was the first time that Hawkins and Cochrane knew the identity of Bagley. (CA8 A. 5-6, 14-16, 21; Tr. of Hearing of April 29, 1977 (Civ. No. 76-252-2) (S.D. Iowa) 49-52; Tr. of Hearing of May 10, 1977 (Civ. No. 76-252-2) (S.D. Iowa) 88-98). The original of all documents received from Bagley have

been maintained since receipt in the law offices of Hawkins in Des Moines. (Tr. of Hearing of Apr. 29, 1977 (Civ. No. 76-252-2) (S.D. Iowa) 5153) Hawkins was served with the identical complaints of IBP and the requests to produce at his home in Des Moines, and Cochrane was served in St. Paul. (CA8 A. 6-8) In order for Cochrane to comply with the motions to produce, he would have to come to the Southern District of Iowa and procure documents from the offices of Hawkins in Des Moines. Des Moines, Iowa is the headquarters of the Southern District of Iowa.

On November 17, 1977, the United States District Court for the Southern District of Iowa, Hon. William C. Stuart, Chief Judge, presiding, dismissed respondent's instant complaint on grounds of improper venue. (P.A. A-1-4; CA8 A. 71-74) The United States Court of Appeals for the Eighth Circuit reversed in part, holding that venue was proper for Hawkins' claim in the Southern District of Iowa, but the proper venue for Cochrane's claim was the District of Minnesota. On March 5, 1979, the Eighth Circuit denied rehearing en banc. (P.A. A-5-25)

ARGUMENT

I.

THE PETITIONERS DO NOT COME BEFORE THIS COURT WITH CLEAN HANDS

The petitioners ask this Court to grant certiorari on the basis of crucial questions of judicial administration. Petitioners characterize the decision of the Eighth Circuit as promoting duplication of judicial effort and the possibility of conflicting decisions. Petitioners, however, cannot be heard to seriously complain about forum shopping, proliferation of collateral lawsuits, or duplication of judicial effort, in light of their conduct in these cases.

The original antitrust action was filed in the Southern District of Iowa. It was the petitioners who instituted the two collateral cases in the Northern District of Iowa and Southern District of New York, because they wer dissatisfied with the manner in which discovery was proceeding in the Southern District of Iowa. This instant action was filed in the Southern District of Iowa, the forum of the original antitrust action, familiar with the underlying facts.

Now petitioners seek this Court's review of the decision of the Eighth Circuit (written by Hon. William H. Becker, a recognized leader in matters of complex and multidistrict litigation, and denied rehearing en banc) on the basis of needless proliferation of lawsuits and waste of federal judicial resources. If ever the doctrine of *in pari delicto* can apply to a certiorari decision, it surely must apply here.

Traditionally certiorari was a prerogative writ used to correct excesses in the exercise of judicial power where no other adequate remedy existed. Here the petitioners had an adequate remedy. They could have conformed themselves to orderly litigation in the antitrust action. Instead, petitioners

jumped ship, and filed collateral proceedings in two other districts. This is not the kind of action appropriate for Supreme Court review. The writ should not issue.

II.

UNDER THE STANDARDS OF ANY CIRCUIT, VENUE IN THIS CASE IS PROPER IN THE SOUTHERN DISTRICT OF IOWA

None of the petitioners are residents of the Northern District of Iowa. They filed duplicate lawsuits in both the Northern District of Iowa and the Southern District of New York. They caused both actions and both requests for production of documents to be served upon the respondent Hawkins in Des Moines and the respondent Cochrane in St. Paul. These actions of the petitioners were intended to cause the respondents to perform by defending and producing documents in the Southern District of Iowa and further were intended to affect the course of proceedings in the antitrust action pending in the Southern District of Iowa.

Petitioners cite *Gardner Engineering Corp. v. Page Engineering Co.*, 484 F.2d 27 (CA8 1973), and *Commercial Lighting Products, Inc. v. United States District Court*, 537 F.2d 1078 (CA9 1976), as being in conflict with the Eighth Circuit's holding on venue in this case. A close examination of *Gardner Engineering* and *Commercial Lighting* reveals, however, that the decision of the Eighth Circuit is in compliance with the standards announced previously by that Circuit and by the Ninth Circuit.

Gardner Engineering involved an anticipatory breach of contract by an Illinois firm. Non-Arkansas citizens brought the action in Arkansas on the basis that the contract was to be performed in Arkansas. The Eighth Circuit there held that venue was proper in Arkansas, the place where the contract was to be performed, and not in Illinois, the place where the defendant sent the letter declared to be breach of contract. 484 F.2d at 33.

In *Commercial Lighting*, the Ninth Circuit granted a petition for writ of mandamus setting aside an order of the

district court which transferred the case to Michigan pursuant to 28 U.S.C. § 1404(a). The district court had transferred the action from California partially on the basis that there was a prior action between the parties pending in the Eastern District of Michigan, which involved similar business torts, and the defendants had consented to the transfer. In granting mandamus and vacating the transfer order, the Ninth Circuit concluded:

> "*A fortiori*, a plaintiff should not be forced to litigate in a forum that he did not choose, in which none of the individual defendant parties reside and in which contacts were minimal."

537 F.2d at 1080. Likewise, *Gardner Engineering* also states:

> "Since venue is a procedural rule of convenience, the convenience of the agrieved parties should be first accommodated."

484 F.2d at 33.

The petitioners here vigorously contend that under 28 U.S.C. § 1391(a) the claim arose in the Northern District of Iowa. But Judge Becker, writing for the Eighth Circuit, correctly perceived the illogic of this contention in stating:

> "For if the claim related to the process issued in the Northern District of Iowa arose in the Northern District of Iowa, then a separate second claim arose in the Southern District of New York."

(P.A. A-18) Although respondents still believe that venue for Cochrane's claim is proper in the Southern District of Iowa because a substantial part of the events or omissions giving rise to the claim occurred there, certainly Cochrane's claim has far more significant relationship to the District of Minnesota than to the Northern District of Iowa.

The Eighth Circuit's decision did not create a conflict in the circuits. There is no error of law on the venue issue for this Court to review by certiorari.

III.

THERE CAN BE NO COMPULSORY COUNTERCLAIM WHEN THERE IS NO ACTION PENDING

IBP is a Delaware corporation with its principal place of business in Dakota City, Nebraska. The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is an unincorporated association having members in Nebraska, and particularly having as its members IBP's employees at its Dakota City, Nebraska plant. *See United States v. Hart*, 417 F. Supp. 1314, 1316 (S.D. Iowa 1976).

In both the actions in the Northern District of Iowa and in the Southern District of New York, IBP named the Meat Cutters Union as a defendant and claimed jurisdiction solely on diversity of citizenship. Under *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965), there is no diversity of citizenship. The Meat Cutters Union and the respondents filed motions to dismiss. At this point, there were no actions pending. F.R. Civ. Proc. 12(h) (3) provides:

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

There was no "complaint" on file in either the Southern District of New York or Northern District of Iowa because the pleadings did not contain "a short plain statement of the grounds upon which the court's jurisdiction depends." F.R. Civ. Proc. 8(a). Accordingly, the Eighth Circuit was correct in concluding that there was no action pending. (P.A. A-21, A24-25).

It is elementary that a compulsory counterclaim falls within the ancillary jurisdiction of the court. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n. 1 (1974). Accordingly, if a federal court does not have jurisdiction of the subject

matter over the original claim, it cannot proceed to adjudicate a compulsory counterclaim absent independent filing and service of process, because there is nothing to support ancillary jurisdiction over the counterclaim. *DHL Corp. v. Loomis Courier Service, Inc.*, 522 F.2d 982 (CA9 1975); *National Research Bureau, Inc. v. Bartholomew*, 484 F.2d 386 (CA3 1973); 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1414 at pp. 79-80 (1971).

There is no case holding that a party has the duty to wait to file a counterclaim in anticipation that a claimant might cure a subject matter jurisdiction problem. Petitioners claim that their subsequent amendments of August 1, 1977, relate back to the original filing date according to F.R. Civ. Proc. 15(c). As the Eighth Circuit correctly stated:

> "The purposes for which this provision of Rule 15(c), F.R. Civ. P. were intended do not include a procedural fiction applicable to changing the facts in civil actions competing for priority in filing under Rule 13(a) F.R. Civ. P."

(A. A-25) The purpose of Rule 15(c) is to assure that legitimate causes of action, improperly pleaded, are not barred by the statute of limitations. *See* 3 Moore's Federal Practice ¶15.15. On occasion, federal courts have also utilized Rule 15(c) to validate service of a process in prevention of needless expense in duplicating service of process. 3 Moore's Federal Practice ¶15.15[6].

Columbia Plaza Corp. v. Security National Bank, 525 F. 2d 620 (CADC 1975), does not support petitioners' position. The holding in *Columbia Plaza* is that the *original claim*, first filed, arose out of the same transaction or occurrence as a subsequent filed claim in another district. Pursuant to Rule 13(a), the District of Columbia Circuit found that the common transaction was an office building project and that the evidence offered to support both actions would be

substantially identical. 525 F.2d at 625. For that reason, the District of Columbia Circuit also found that a subsequent amendment to the first action related back to the original filing date pursuant to Rule 15(c). 525 F.2d at 626. The main issue in the *Columbia Plaza* case, however, was whether an injunction should issue in the first case enjoining prosecution of the second. The District of Columbia Circuit rejected a "first-filed" argument, and looked to the convenience of the parties, witnesses, and court to determine whether the injunction should issue. 525 F.2d at 627-29.

Here, the teachings of the Court of Appeals for the Fifth Circuit are applicable:

> "It is questionable whether the doctrine of 'relation back' should be applied with the same liberality when it will deprive a party against whom the amendment is made of a substantial right, or impose upon such party a serious liability, as when its purpose is simply to lift the bar of the statute of limitations."

United States v. Stromberg, 227 F.2d 903, 906 (CA5 1955). Here, petitioners attempted to deprive respondents of substantial rights by filing the subsequent amendments and then claiming compulsory counterclaim. Those rights include the right to file in the forum of the claimant's choice and the right to file in the forum with the most substantial contacts with the litigation. It is quite evident that IBP and the Amalgamated Meat Cutters have had long, serious and violent labor disputes in the Sioux City, Iowa area. *United States v. Hart*, 417 F. Supp. 1314 (S.D. Iowa 1976). The petitioners have attempted to tie respondents to the Meat Cutters Union under a conspiracy theory, in an effort to prejudice the rights of the respondents. To hold that respondents must file a compulsory counterclaim in Sioux City as a result of a subsequently filed amendment would be to exacerbate the prejudice to the respondents.

IV.

THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT THIS ACTION DID NOT ARISE OUT OF THE SAME TRANSACTION OR OCCURRENCE WHICH WAS THE SUBJECT MATTER OF THE DUPLICATE ACTIONS IN THE SOUTHERN DISTRICT OF NEW YORK AND THE NORTHERN DISTRICT OF IOWA

The transaction apparently complained of in IBP's action against the respondents in the Northern District of Iowa is some sort of conspiracy with the Amalgamated Meat Cutters to induce breaches of employment contract and fiduciary duties by former employees of IBP. The transaction complained of in this instant case in the Southern District of Iowa is the attempt by the petitioners to gain discovery denied them in the antitrust case and to thwart or chill the investigation and prosecution of the *MPIA* antitrust litigation. The transactions have no logical relationship to one another. Both transactions involve the petitioners, the respondents, and Hughes Bagley, and for this reason pretrial consolidation for discovery under 28 U.S.C. § 1407 was sought. But the evidence to support each of the claims is substantially, if not entirely, different.

The Court of Appeals below placed substantial reliance upon the case of *Bose Corporation v. Consumers Union of United States, Inc.*, 346 F. Supp. 600 (D. Mass. 1974). The *Bose* case and its rationale was expressly adopted in *Harris v. Steinem*, 571 F.2d 119, 124 (CA2 1978). It is totally consistent with the proceedings in the Fifth Circuit in *Hyde Construction Co., Inc. v. Koehring Co.*, 387 F. Supp. 702, 712 (S.D. Miss. 1974), *aff'd. in relevant part, sub nom, Dunn v. Koehring Co.*, 546 F.2d 1193 (CA5 1977).

To the extent that the cases of *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (CA2 1977), and *Great Lakes Rubber Corp. v. Herbert Cooper Co., Inc.*, 286 F.2d 631 (CA3 1961), have any applicability to this fact situation, they would support the proposition that both the case in the Northern District of Iowa and this instant action in the Southern District of Iowa bare some logical relation to the *MPIA* antitrust action filed in the Southern District of Iowa on August 10, 1976. But the issue of whether both of these actions rightfully should be transferred to the Northern District of Texas for consolidated pretrial proceedings in *In Re Beef Industry Antitrust Litigation*. MDL No. 248, is not before this Court.

The Eighth Circuit was correct in holding that respondents did not have a compulsory counterclaim under Rule 13(a). There is no conflict in the circuits on this issue. This Court should not grant certiorari.

CONCLUSION

Petitioners have shown no special or important reasons for granting certiorari in this case. There are no conflicting decisions among the circuits. There is no departure from the accepted and usual course of judicial proceedings. Accordingly, respondents pray that this Court refuse to grant a writ of certiorari to the Eighth Circuit.

Respectfully submitted,

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